IN THE

Supreme Court of the United States

October Term, 1920

No. 695

O. O. ASKREN, Attorney General of the State of New Mexico, et al.,
Appellants,
v.
THE CONTINENTAL OIL COMPANY,
Appellee.

Appeal from the District Court of the United States for the District of New Mexico.

BRIEF FOR APPELLEE.

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Denver, Colorado, March 26, 1921.

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INDEX

TABLE OF CASES CITED

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Statement of Case.

This case was here on appeal from the order granting a preliminary injunction.

Askren v. Continental Oil Company, 252 U. S. 444.

The method by which the appellee conducts business is accurately described in the opinion rendered on that appeal. At page 448 the court said:

"Plaintiffs are engaged in the business of buying and selling gasoline and other petroleum products. The bills state that they purchase gasoline in the States of Colorado, California, Oklahoma, Texas and Kansas, and ship it into the State of New Mexico, there to be sold and delivered. The bills describe two classes of business—first, that they purchase in the States mentioned, or in some one of said States, gasoline, and ship it in tank cars from the State in which purchased into the State of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages, in which the gasoline was shipped have been broken. In the usual and regular course of their business they purchase gasoline in one of the States, other than the State of New Mexico, and ship it, so purchased from that State, in barrels and packages containing not less than two 5-gallon cans, into the State of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages, containing the cans, it is their custom to sell the gasoline in the original packages and barrels. The gasoline is sold and delivered to the customers in precisely the same form and condition as when received in the State of New Mexico; that this manner of sale makes the plaintiff's distributors of gasoline as the term is defined in the statute, and they are required to pay the sum of $50.00 per annum for each of their stations as an annual license tax for purchasing, shipping and selling gasoline as aforesaid.

A second method of dealing in gasoline is described in the bills: That the gasoline shipped to the plaintiffs from the other States, as aforesaid, is in tank cars, and plaintiff, or plaintiffs,

sell such gasoline from such tank cars, barrels and packages in such quantities as the purchaser requires."

Insofar as the act imposed a tax upon that portion of appellee's business first described this court held that it was the exertion of a power not possessed by the State of New Mexico, but insofar as it imposed a tax upon the second class of business described it was a legitimate exercise of state power.

The court said:

> "Sales of the class last mentioned would be a subject of taxation within the legitimate power of the State. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is non-taxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing."

Upon the original appeal we urged that no state may single out an article of commerce not produced in that state and which, in the nature of things, can only reach the state in interstate commerce, and impose a tax upon the right to sell or use that article.

This contention elicited the following observations from the court:

> "Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that State must be brought in from other States. But, so long as there is no discrimination against the products of another

State, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in, is not beyond the taxing power of the State."

To our surprise *Wagner v. Covington* was cited as supporting this announcement, although it did not involve the question we had urged; and, in fact, was only another of a long list of cases holding that a state may license peddlers and itinerant venders.

Upon the return of the case to the trial court the bill of complaint was amended by specifically alleging that gasoline is the only product upon sales of which the State of New Mexico attempts to impose any excise tax whatever; and that the imposition of a tax upon the right to *use* gasoline *in its essence* is a tax upon the gasoline, thus bringing the act into conflict with section 1 of Article VIII of the Constitution of New Mexico.

The appellants filed an answer expressly admitting the material allegations of the bill of complaint. Otherwise the answer alleges what the pleader conceived to be the relative importance of the two kinds of business above described as being conducted by the appellee.

Upon the trial the aggregate of the two kinds of business conducted by appellee within the years 1918 and 1919 and for the first seven months of the year 1920 was stated to the court by way of stipulation. With respect thereto counsel for appellants stated:

"The statement of sales and use of gasoline as aforesaid represents the ordinary course of business of the said company as conducted during this period and for the purpose of this case representing the ordinary business of the com-

pany, but so far as the percentages of the two kinds of business are concerned, it merely represents the actual facts for the time mentioned and it is admitted that the future precentages will depend upon the circumstances and demands of the customers of the company."

The stipulation and the foregoing statement of counsel for appellants are incorporated in the opinion of the lower court.

Speaking in round numbers, the stipulation discloses that for the year 1918 the original package business of appellee was approximately 6% of the broken package business, for the year 1919 2¼% thereof, and for the first seven months of 1920 a little more than 10% thereof. There is no pretense, nor could there be, on the part of either appellants or appellee that the one kind of business is *merely an incident* of the other; both kinds of business are being conducted in the ordinary course, and, as stated by counsel for appellants, the future percentages of the two kinds of business will depend upon the circumstances and demands of the customers of the appellee.

Accordingly the sole question presented to the trial court, stated in the language of the court, was: *Is this statute separable and capable of being sustained as far as it imposes a tax upon domestic business legitimately taxable?*

This question was answered in the negative and a decree making the preliminary injunction perpetual followed.

For the convenience of the court the entire act in question is set forth in an appendix to this brief.

OUTLINE OF ARGUMENT.

1. *This court, in stating upon the former appeal that from the averments of the bill it was impossible to determine the relative importance of the taxable part of the business as compared with that which is non-taxable, did not mean and could not have meant to announce a new rule for the determination of the separability of an act in part constitutional and in part unconstitutional, or to overrule or repudiate the principles long since established for the determination of such question of separability.*

2. *It is the well established doctrine that a statute valid in part and invalid in part cannot be sustained at all unless capable of separation so that each part may stand by itself; and the court has no power, by interpolation or interlineation, to limit or qualify the meaning of the words as used by the legislature.*

3. *The New Mexico act is so drawn that the constitutional part, assuming that upon the present record any part thereof can be held to be constitutional, and the unconstitutional part cannot be separated.*

4. *The act evinces with such clearness a purpose to tax interstate as well as domestic sales that there is no basis whatever for interpretation; and, moreover, this court has already interpreted the act in this respect according to the legislative intent unambiguously expressed.*

5. *It being now admitted upon the record that gasoline is the only product upon which an excise tax is imposed by the state of New Mexico, that fact, coupled with the further fact that gasoline is not produced to any extent whatever in the state of New Mexico, shows that the law under consideration in its practical enforcement necessarily constitutes a burden upon and a discrimination against interstate commerce, and for that reason is void in its entirety.*

6. *The statute, to the extent that it imposes a tax upon the right to use gasoline, constitutes a tax upon the property itself, and in this respect the statute is void because in conflict with the constitution of New Mexico.*

ARGUMENT.

I.

THIS COURT, IN STATING UPON THE FORMER APPEAL THAT FROM THE AVERMENTS OF THE BILL IT WAS IMPOSSIBLE TO DETERMINE THE RELATIVE IMPORTANCE OF THE TAXABLE PART OF THE BUSINESS AS COMPARED WITH THAT WHICH IS NON-TAXABLE, DID NOT MEAN AND COULD NOT HAVE MEANT TO ANNOUNCE A NEW RULE FOR THE DETERMINATION OF THE SEPARABILITY OF AN ACT IN PART CONSTITUTIONAL AND IN PART UNCONSTITUTIONAL, OR TO OVERRULE OR REPUDIATE THE

PRINCIPLES LONG SINCE ESTABLISHED FOR THE DETERMINATION OF SUCH QUESTION OF SEPARABILITY.

Upon the appeal from the order granting the preliminary injunction, giving a reason why this court did not go into the question whether the act is separable and capable of being sustained so far as it imposes a tax upon domestic business, His Honor, Mr. Justice Day, stated *that from the averments of the bills it was impossible to determine the relative importance of this part of the business* (referring to the domestic business) *as compared with that which was non-taxable.*

Throughout the subsequent proceedings counsel for the appellants have proceeded upon the assumption that the court meant to determine and did determine that the separability of the constitutional and unconstitutional parts of the New Mexico act is to be determined by the relative importance of the two kinds of business as conducted by a particular plaintiff. Surely this cannot be the meaning of the language of the court. This would mean that the statute would be declared constitutional or unconstitutional according to the person who happened to be the plaintiff in a particular case. The statute is either constitutional or unconstitutional, separable or inseparable; and if unconstitutional and inseparable in a suit by a merchant, 50 per cent., 75 per cent. or 90 per cent. of whose business is conducted in original containers, then it is equally unconstitutional and inseparable in this suit where for the years thus far disclosed the business conducted in

original containers averages something less than 10 per cent. of the total business.

The contention of counsel for appellants as to the meaning of the language of this court can be no better answered than to quote from the opinion of the court below. Judge Neblett said:

> "It is contended by counsel for defendants that in view of this language used by the Supreme Court, the relative importance of the business done by the plaintiff, that is, the amount of interstate business as compared to domestic business, should control and govern the court in determining the validity of this law. It is true as shown by the stipulation filed in this cause, that more than 90 per cent. of the business done by the plaintiff is domestic or retail business. I do not think the Supreme Court intended to lay down a new rule of law to guide the court in passing on the separability of statutes of this kind. If the Court construed this statute according to the contentions of counsel for defendant, the court would, in a case where 95 per cent of the business was retail and 5 per cent interstate, have to hold the law was separable and valid as to such retail business. On the other hand if 95 per cent of the business was interstate and 5 per cent retail or domestic business, the court would have to hold the law unconstitutional. I do not think the court meant that any such rule should be followed. In the case now being considered, the interstate business is not an incident of plaintiff's business, but a material part of its regular business."

The relative importance of the two kinds of business might lead the state to abandon any defense to a suit seeking an injunction against the enforcement of

the law, but certainly the relative importance of the two kinds of business, where both are conducted in good faith and neither as an incident to the other, throws no light on the question whether, without interlineation or amendment, the valid part of the act can be separated from the invalid part so as to give effect to the former.

If the New Mexico License and Excise Act is separable, so as to permit the valid part thereof to stand, then the valid portion of the act is applicable alike to the small merchant and to the large merchant, and to the domestic sales of the gasoline dealer, whether those domestic sales are one per cent. or ninety-nine per cent. of the total business, and this is the rule long ago announced by this tribunal.

In *Kehrer v. Stewart*, 197 U. S. 60, the court had under consideration an act of the legislature of the state of Georgia. That law imposed a tax the validity of which was drawn in question. The Supreme Court of Georgia had construed the law to be separable and sustained it as to the domestic business, although holding it invalid as to the interstate business. That construction, of course, prevailed in this Court. However, it was contended in that case that the domestic business was insignificant in comparison with the interstate business and was a mere incident to the latter. Answering this contention the court said:

> "If the agent carried on a definite, though a minor part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the im-

position of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."

Under this authority it is perfectly clear that if the law now under consideration is subject to separation and is properly separable, the court still adhering to the view that it is in part constitutional, then the tax upon domestic business of the appellee is valid, and is equally valid whether in a particular year the domestic business happens to be 95 per cent or only 5 per cent of the total business. We repeat, however, that the relative importance of the business of a particular plaintiff does not aid in the slightest degree in determining whether the act is separable. The separability of the act must be determined by a consideration of the words of the act when tested by principles long since established and decisions now universally recognized.

II.

IT IS THE WELL-ESTABLISHED DOCTRINE THAT A STATUTE VALID IN PART AND INVALID IN PART CANNOT BE SUSTAINED AT ALL UNLESS CAPABLE OF SEPARATION SO THAT EACH PART MAY STAND BY ITSELF; AND THE COURT HAS NO POWER,

BY INTERPOLATION OR INTERLINEATION, TO LIMIT OR QUALIFY THE MEANING OF THE WORDS AS USED BY THE LEGISLATURE.

That a statute may be so drawn that one part thereof may be enforced as a constitutional exercise of legislative power, while another part thereof is adjudged to be unconstitutional and void, is conceded. For such a result to follow, however, the courts have declared that two conditions must coexist. In the first place the constitutional and the unconstitutional parts must be capable of separation, so that each may be read and may stand by itself; and, in the second place, the unconstitutional part must not be so connected with and interwoven into the general scope of the law, as cause and effect or otherwise, as to make it impossible, when the unconstitutional part is stricken, by the enforcement of what remains to give effect to the legislative intent. These conditions were clearly and forcibly stated upon the authority of repeated decisions of this court by Judge Sanborn, speaking for the Circuit Court of appeals of the Eighth circuit in *Cella Commission Company v. Bohlinger*, 147 Fed. 419. After stating that where a law is constitutional in part and unconstitutional in part the former may sometimes be sustained while the latter fails, he said:

> "But there are two indispensable conditions of such a result, that the constitutional and the unconstitutional parts are capable of separation so that each may be read and may stand by itself (Baldwin v. Franks, 120 U. S. 679, 685, 686)

and that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the legislature in enacting it. Allen v. Louisiana, 103 U. S. 80, 84; Baldwin v. Franks, 120 U. S. 679, 685, 686; U. S. v. Reese, 92 U. S. 214, 218, 221; The Trade-Mark Cases, 100 U. S. 82, 99; U. S. v. Harris, 106 U. S. 629, 641, 642; The Virginia Coupon Cases, Poindexter v. Greenhow, 114 U. S. 270, 305; Spraigue v. Thompson, 118 U. S. 90, 94; The Income Tax Cases, Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 636."

This doctrine thus lucidly stated by Judge Sanborn is but a repetition of the doctrine repeatedly announced by this Court.

In *Baldwin v. Franks*, 120 U. S. 679, the court had under consideration section 5519 of the Revised Statutes which provided for the punishment of persons who in any state or territory should conspire for the purpose of either directly or indirectly depriving any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws.

In *United States v. Harris*, 106 U. S. 629, it had been decided that this section was unconstitutional as a provision for the punishment of conspiracies of the character therein mentioned within a state. In the Baldwin Case the conspiracy was directed against Sing Lee and others belonging to a class of Chinese aliens, subjects of the Emperor of China, who claimed protection under certain provisions of a treaty between the United States and the Emperor of China. In the Bald-

win Case it was urged that, even though the section of the statute was unconstitutional insofar as by its terms it was made applicable to a conspiracy by persons in a state against a citizen of the United States, the statute was, nevertheless, valid for the purpose of punishing those who conspire to deprive aliens of rights guaranteed to them in a state by the treaties of the United States.

Discussing this argument the court, speaking by Mr. Chief Justice Waite, said:

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States. The limitation

which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

In *United States v. Reese*, 92 U. S. 214, the court had under consideration an indictment against alleged conspirators at a municipal election held in the state of Kentucky. The indictment was based upon a statute which in general terms provided for the punishment of conspirators who should wrongfully refuse to receive the votes of a citizen when presented under circumstances in the statute prescribed and which also provided for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote or from voting at any election. The language was broad enough to cover all cases of such interference with a citizen elector, whether the hindrance was interposed on account of his race, color, or previous condition of servitude, or for any other reason. To the extent that the law was directed against persons interfering with an elector on account of his race, color, or previous condition of servitude the statute was no doubt a lawful exercise of congressional power. To the extent, however, that the language of the statute comprehended interference for other reasons it was beyond the power of congress to enact. In the case under consideration the elector interfered with was a negro. It was attempted to have the court hold that the statute was directed only to cases where the interference with the elector was on account of race, color, or previous condition of servitude. This court held that the language

of the statute did not confine its operation to unlawful discrimination on account of these reasons.

Taking up the question of the separability of the act, the court said:

> "It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce

words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

This question was answered in the negative, the court saying:

> "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In *Pollock v. Farmers Loan & Trust Company*, 158 U. S. 601, considering an income tax act of congress enacted prior to the 16th Amendment, the court, speaking through Mr. Chief Justice Fuller, said:

> "Being of opinion that so much of the section of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections. It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this Act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by *Chief Justice Shaw* in *Warren v. Charleston*, 2 Gray, 84, is applicable, that if the different parts are so 'mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconsti-

tutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by *Mr. Justice Matthews* in *Poindexter v. Greenhow,* 114 U. S. 270: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare that the intention of the legislature was that the part pronounced valid should be enforcible, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact.' And again, as stated by the same eminent judge in *Spraigue v. Thompson,* 118 U. S. 90, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond what any one can say it would have enacted in view of the illegality of the exceptions.' "

Thus it will be observed that this Court has very clearly differentiated between the *separation* of the valid and invalid parts of an act and an *amendment* thereto by interpolation or interlineation. This difference is forcibly illustrated by the Cella Commission Case, *supra.* In that case the court had under consideration a statute which provided:

"In all cases where a cause of action shall accrue to a resident or citizen of the state of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort, or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service of summons and other process may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the township or county where the Auditor is served, or elsewhere in the state. This act shall not be effective in cases where its enforcement would conflict with the powers of Congress or the federal laws to regulate commerce between the states."

By this statute it will be observed that the legislature of Arkansas provided a means for making personal service of process as the basis for personal judgments against *all* foreign corporations. But foreign corporations were properly divisible into two classes so far as the Arkansas statute was concerned: (a) Those foreign corporations *doing business* in Arkansas, and (b) those foreign corporations *not doing business* in Arkansas. The statute above quoted was a lawful exertion of state power as respects those foreign corporations doing business in Arkansas. On the other hand, the statute was wholly beyond the power of the state as respects those foreign corporations not doing busi-

ness in Arkansas. The statute was valid in part and invalid in part. It was urged that as to the foreign corporations doing business in Arkansas the law should be sustained. After stating the two indispensable conditions to sustaining the valid portion of an act a part of which is invalid, and the citation of numerous cases from this Court, Judge Sanborn shows how the language of the act applies to corporations in general, and that a separation is an utter impossibility so as to leave the valid and the invalid portions standing alone. Discussing the question he said:

> "The act of the Legislature of Arkansas of 1901 expressly includes within the same general term foreign corporations which transact no business within that state and those engaged in business therein. The words of the statute are plain and clear, so that there is no room for construction. It does not classify, distinguish or separate in any way corporations engaged in business in the state and those not thus occupied. The part of the statute applicable to the former class cannot be separated from that applicable to the latter class, so that each may be read and may stand by itself, because they are both embodied in a single general clause and included in a single declaration. The unconstitutional part cannot be eliminated from the law by striking out or disregarding any such words or clauses of the act. The result can be attained only by introducing into the statute words of limitation, words which would expressly restrict the term 'foreign corporation' wherever it occurs in the law by the phrase 'doing business in the state of Arkansas,' a species of legislation the court is without power to enact. U. S. v. Reese, 92 U. S. 221."

This is merely another way of saying that the only way to render the act in question valid would be to interline the words "doing business in the state of Arkansas" after the words "foreign corporation" wherever used in the statute. This we submit is not a separation, it is an amendment—a power possessed by the legislature but not a power possessed by the courts. If, therefore, at the threshold of a suit involving the validity of a law constitutional in part and unconstitutional in part it is found that the two parts cannot be separated, such finding is conclusive that the law must fall in its entirety.

Even though the law should be found to be separable, then, as already indicated, the two parts may be found to be so connected or interwoven as to cause and effect or otherwise that the one cannot stand without the other, and in that event it must fall in its entirety. This latter question, however, will not confront us in the case at the bar because, as we shall presently show, a separation of the New Mexico law is an utter impossibility. The only possible chance of giving to the statute the meaning which the state now seeks to have attributed to it is to interline or interpolate words of limitation.

Among other authorities supporting one or both of the principles stated in the excerpts above quoted are:

Spraigue v. Thompson, 118 U. S. 90;
Poindexter v. Greenhow, 114 U. S. 270;
International Text Book Co. v. Pigg, 217 U. S. 91;
Allen v. City of Louisiana, 103 U. S. 80;

Sweet v. United States, 228 Fed. 421, 423;
U. S. v. Lumber Co., 202 Fed. 700, 706;
Chicago M. & St. P. Ry. Co. v. Westby, 178 Fed. 619, 629.

With the doctrine thus stated to guide us we come next to consider the language of the New Mexico act to determine its separability.

III.

THE NEW MEXICO ACT IS SO DRAWN THAT THE CONSTITUTIONAL PART, ASSUMING THAT UPON THE PRESENT RECORD ANY PART THEREOF CAN BE HELD TO BE CONSTITUTIONAL, AND THE UNCONSTITUTIONAL PART CANNOT BE SEPARATED.

As positively and unambiguously as language can speak section 1 of the New Mexico act defines a distributor of gasoline to mean:

> "Every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state."
>
> **(Laws New Mexico 1919, p. 183.)**

A distributor of gasoline is one who sells *in* the tanks, barrels or packages in which shipped, or who sells *from* such tanks, barrels or packages, or from stations. The term "distributor" obviously was intentionally and purposely made sufficiently broad to com-

prehend every conceivable sale of gasoline made in any one of the ways defined.

Section 2 of the act is:

> "Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency." (Laws of New Mexico 1919, p. 183.)

As the Arkansas act above discussed applied to all foreign corporations not doing business in the state, as well as those doing business in the state, the words "distributor of gasoline" include as well, and as certainly and unequivocally, those persons who sell gasoline in interstate commerce as those who sell gasoline in domestic commerce. The one class cannot be separated from the other. Both alike are required to pay the license tax. The only possible way to give to the section in question the meaning urged by the state is for the words, "except distributors who ship gasoline into the state and sell it in the containers in which shipped," to be interlined after the word "gasoline" as used in the above quotation from section 2, so that the act instead of reading, "Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency," as the legislature of New Mexico made it read, shall read as follows:

> "Every distributor of gasoline, *except distributors who ship gasoline into the state and sell it in the containers in which shipped,* shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency."

It is thus rendered as clear as any thought can be expressed in human language that the license feature of the act in question is not subject to separation, except by an amendment which no court has the power to make.

The language imposing the excise tax is equally certain in its meaning.

Section 3 provides:

> "There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used."
>
> (Laws of New Mexico 1919, p. 183.)

We respectfully challenge any sort of suggestion by which this language can be separated so as to leave what has been declared to be the valid and the invalid parts thereof standing alone. Here again an *interlineation*, and not a *separation*, is necessary. In order to give to the section the meaning which counsel for the state of New Mexico would have the court attribute to it the words, "except that shipped into the state and sold in the container in which shipped," must be interlined after the figures "1919," so that the section instead of reading in the language adopted by the legislature shall read:

> "There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this state after July 1st, 1919, *except that shipped into the state and sold in the containers in which shipped*, which tax shall be paid as

hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used."

The statute may be read section by section, sentence by sentence, and word by word, and it will be found utterly impossible to make a separation of that part of the act which this court has already adjudged to be invalid from that part of the statute adjudged to be valid, so that the latter may stand alone. A separation being utterly impossible, the act must fall in its entirety.

IV.

THE ACT EVINCES WITH SUCH CLEARNESS A PURPOSE TO TAX INTERSTATE AS WELL AS DOMESTIC SALES THAT THERE IS NO BASIS WHATEVER FOR INTERPRETATION, AND MOREOVER THIS COURT HAS ALREADY INTERPRETED THE ACT IN THIS RESPECT ACCORDING TO THE LEGISLATIVE INTENT UNAMBIGUOUSLY EXPRESSED.

This brief is being prepared before the receipt of a copy of the brief on behalf of appellants and this paragraph is directed to an argument seriously urged in the lower court. In that court many authorities were cited by counsel for appellants to the general effect that where a statute is ambiguous and reasonably capable of having two meanings attributed to it, the one rendering the statute unconstitutional and the other rendering the act constitutional, that meaning

should be given which will enable the statute to stand. With this doctrine we have no controversy. The act here involved, however, has not the slightest ambiguity. There is no basis for construction. The purpose of the legislature to tax all gasoline, however shipped or sold, is too clear to admit of dispute. The statute as written is so unambiguous in its terms and so certain and unequivocal in its meaning that there can be no possible basis for construing it to mean anything other than its language naturally imports. In such circumstances rules of construction do not apply.

In *Board of County Commissioners v. Rollins*, 130 U. S. 662, this court said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
>
> To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a

definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. *Newell v. People,* 7 N. Y. 97; *Hills v. Chicago,* 60 Ill. 86; *Denn v. Reid,* 35 U. S. 10 Pet. 524; *Leonard v. Wiseman,* 31 Md. 204; *People v. Potter,* 47 N. Y. Cooley Const. Lim., p. 57; Story Const., sec. 400; *Beardstown v. Virginia,* 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

As was well said by the Supreme Court of Colorado in the case of *People ex. rel. v. Prevost,* 55 Colo. 199, 209:

> "Rules of construction, if applicable, prove helpful, but if not applicable they may lead astray and are not to be resorted to. When the language of the constitution is plain and unambiguous there is no room for construction. What the words declare is the meaning and courts have no right to add to or take from that meaning."

Of course, the court will have the doctrine thus stated in mind as it considers the language of the New Mexico act. We assert that in this act there is not to be found the slightest basis for uncertainty as to the legislative intent. The language is clear, positive and unambiguous. The legislature knew what is conceded upon this record, that no gasoline whatever was produced in the state of New Mexico. A purpose about

which there is no doubt is evinced to impose the excise tax upon every single gallon of gasoline sold or used in the state of New Mexico, with the slight exception for the benefit of tourists directly to be noted, whether that gasoline is shipped and sold in original packages or otherwise.

The first section of the act defines a distributor in such terms as to include every person who in any way ships and in any way sells the product. The legislature knew that when the gasoline was brought into the state it would have to be shipped in tanks, barrels or packages, and when shipped the legislature also knew that if it was sold at all it would have to be sold either *in* the packages in which shipped or *from* said packages or from stations at which placed. Accordingly a distributor of gasoline is clearly, unequivocally and unambiguously defined by the legislature to mean *every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this state.*

If in this language any one can find any basis for the contention that the legislature intended to except from the operation of that definition persons who ship gasoline into the state and sell it in the containers in which shipped, he can find what we have not been able to discover, and, more, he will find what counsel for the state hitherto have not pretended to discover.

Section 2 of the act proceeds to impose what is known as the annual license tax, and that tax is im-

posed upon every distributor in language so certain and positive that the court of necessity must permit the words to speak for themselves and thus express their own meaning.

The language is:

> "Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency."

"Every distributor" means every distributor as defined in the first section, and the distributor defined in the first section is the person who sells *in* the containers in which the gasoline is shipped, or the person who sells gasoline *from* the containers in which the gasoline is shipped or from the stations at which the gasoline is placed. Whether he sells in the one way or the other the language of section 2 applies, and applies equally; and whether he sells exclusively in the one way or the other, or in both ways, he is required to pay the exaction of fifty dollars per annum for each station or place of business from which the sales are made. There is no occasion for construction. Construction is unnecessary. To attempt to apply canons of construction to language as clear as that of section 2 can only have the effect of rendering uncertain that which in itself is absolutely definite and certain in its meaning.

Again, by section 3, the excise tax is imposed and the language there employed is equally certain in its meaning with that found in the first and second sections.

The language is:

> "There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used."

This language contains the very words a linguist would employ if he desired to render certain his purpose to tax every gallon of gasoline sold or used, no matter how shipped or how sold. The purpose to reach every single gallon of gasoline sold in the State of New Mexico or used in that state is as obvious as a purpose can be expressed in language.

This purpose to reach and tax every gallon of gasoline sold or used in the state finds further expression in section 4. If it comes to pass that a retail dealer shall sell any gasoline which he did not purchase from a licensed distributor in the state, then the retail dealer is required to make a return and with it a remittance of an amount of money equal to two cents per gallon upon all such gasoline sold. In other words, if the retail dealer purchases gasoline not from a distributor within the state, but from without the state, and ships the gasoline into the state and then sells it, no matter how the shipment is made, and no matter how the sale is made, he is required to make a return and with it the remittance of the tax.

Section 4 also renders it unlawful for any person knowingly to use any gasoline upon which the tax has not been paid, and in section 5 it is declared to be unlawful for any person, except tourists or travelers to the extent directly to be stated, to use any gasoline not

purchased from a licensed distributor or retail dealer without paying the tax at the rate of two cents per gallon; and every person who uses gasoline not so purchased is required to make return to the state on or before the 10th of each month of all gasoline used during the preceding month, and with the return to make remittance of an amount of money equal to two cents per gallon upon all gasoline so used. In other words, if the individual who uses gasoline for his own purposes should purchase in Colorado or elsewhere and ship into New Mexico a tank of gasoline, then he is burdened with the obligation under this law, in the event he uses the gasoline, to pay the excise tax thereon.

And, finally, if doubt could be entertained when there is no basis for doubt, as if to preclude every possibility for the assertion of doubt as to the purpose of the legislature, it is provided in section 5 that tourists or travelers coming into the state in a motor vehicle may bring into the state in such vehicle, and for their own use only, *not more than twenty gallons* of gasoline at one time and use such gasoline without the payment of the tax thereon. This is a definite description by the legislature of the only gasoline which can be brought into the state and either sold or used without its owner being subjected to the excise tax; and the legislature takes particular pains to describe the person who is thus excluded and the particular means by which the gasoline is to be imported, and the limited amount which may be imported and used under this exemption.

Not only does the general language of the act comprehend all gasoline but the specific exemption of gaso-

line brought into the state by tourists in the manner described demonstrates that, subject only to this *stated exemption*, the general language was intended to cover *all* gasoline sold or used in the state—that is, to mean what it seems to mean and what the words used naturally import. It is a well recognized canon of construction long ago announced by this Court that the engrafting of an exception upon a law is evidence that but for the language making the exception the thing excepted would have been included.

We have carefully and painstakingly considered every part, indeed every word, of this act and are able now to assert with all possible confidence that in the act is not to be found any basis for an interpretation of the act, giving it a meaning different from that which the language employed naturally signifies; and that meaning, unambiguously expressed, is that every distributor, whether he sells exclusively in original containers, or otherwise, must pay annually fifty dollars per station or place of business within the state, and that every person who sells gasoline, whether sold in the containers in which shipped or otherwise, or whether shipped into the state for use and for use taken from the containers in which shipped, shall pay the excise tax of two cents upon each gallon of gasoline sold or used.

We have taken the pains thus to show that there is no basis for construction or interpretation merely because in the trial below it was argued with apparent seriousness that the act should be construed as applicable to domestic sales only. Before concluding this

phase of our argument, however, we should call the Court's specific attention to the fact that upon this subject counsel are foreclosed by the previous decision of this Court. Upon the appeal from the order granting the preliminary injunction this Court clearly construed the act to be applicable both to interstate and domestic sales, although counsel for the state upon that appeal and in their printed brief argued for a construction restricting the act to domestic business.

V.

IT BEING NOW ADMITTED UPON THE RECORD THAT GASOLINE IS THE ONLY PRODUCT UPON WHICH AN EXCISE TAX IS IMPOSED BY THE STATE OF NEW MEXICO, THAT FACT, COUPLED WITH THE FURTHER FACT THAT GASOLINE IS NOT PRODUCED TO ANY EXTENT WHATEVER IN THE STATE OF NEW MEXICO, SHOWS THAT THE LAW UNDER CONSIDERATION IN ITS PRACTICAL ENFORCEMENT NECESSARILY CONSTITUTES A BURDEN UPON AND DISCRIMINATION AGAINST INTERSTATE COMMERCE, AND FOR THAT REASON IS VOID IN ITS ENTIRETY.

No gasoline whatever is produced in the state of New Mexico. The state of New Mexico has imposed an excise tax upon no product except gasoline. If the law now under consideration is valid, then it would be equally valid if the excise tax had been fixed at four

cents per gallon or ten cents per gallon or five hundred cents per gallon. When it is once conceded that the state has the power to impose an excise tax there is no limit upon the exercise of that power. It may be made prohibitory as a practical proposition because of the nature of the burden imposed. Unlike police measures, such as inspection laws which must be reasonable, that reasonableness to be determined by the cost of inspection, the excise tax, where the power to impose it exists, may be utterly unreasonable, or as stated, entirely prohibitory in its effect.

When this case was here upon the former appeal we urged with earnestness, if not with force and clearness, that no state may single out an article of commerce not produced within her borders and impose a tax upon the right to sell or use that article without violating the Commerce Clause of the Constitution of the United States. This contention the court disposed of by the statement:

> "Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that state must be brought from other states. But so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in is not beyond the taxing power of the state. *Wagner v. City of Covington*, 251 U. S. 95, and the cases from this court cited therein."

May we respectfully say that we never believed, and it was not our purpose to argue, that the mere

fact that gasoline is produced in another state removes gasoline so produced from the imposition of an excise tax. Certainly gasoline produced in another state may be the subject of an excise tax imposed by a different state when the taxing state is a producer of gasoline. We respectfully submit, however, that the proposition which we endeavored to urge, and which we still ask permission to present, fortified as our position is by the further fact, now admitted, that gasoline is the only subject of an excise tax in New Mexico, was not involved, discussed or decided in *Wagner v. Covington*, 251 U. S. 95. We further submit that the question urged by us hitherto has never been discussed in any decision of this Court.

So far as the Commerce Clause of the Constitution is concerned, we have not denied the power of the state to impose an excise tax where the law *can* operate and as a practical proposition *does* operate in the same manner upon articles produced within the state as upon articles elsewhere produced and shipped into the state. However, it is a very different proposition for a state legislature to classify the products of its own state and to impose an excise tax upon all articles within a class, including alike those produced within the state and those shipped from other states, *than for the legislature to cast about in search of some article of commerce extensively imported into the state for sale and use therein but which the state does not produce in any quantity, and then to single out that article to the exclusion of all others and impose an excise tax upon the right to sell or use it.* If the state may do the latter she

may utterly prohibit the importation of the article by fixing the excise tax so high as to amount to a prohibition. In those cases where the excise tax is imposed upon all property of a particular class, that class being made up of the products of the state and like products imported from other states or foreign countries, there is a practical guaranty of reasonable legislation. A like practical guaranty attaches to state legislation providing for the imposition of a general property tax applicable equally and alike to the products of the taxing state and imported products commingled therewith. There is no danger of a state legislature imposing a prohibitory excise tax upon the products of its own state, nor is there any danger of a state legislature providing for the imposition of unreasonable and unnecessary uniform general taxes. These considerations undoubtedly largely impelled the judicial conclusion that state taxing laws of the two kinds mentioned, operating equally and uniformly upon property produced within the state and property shipped from other states, are not in violation of the Commerce Clause of the Federal Constitution. The practical guaranty mentioned, however, will not obtain if it be held that a state, for revenue purposes, by calling the tax an excise tax may direct her law alone to the class of property not produced in the state. This thought finds illustration in the gasoline excise laws of the various states of the United States. Not one of the states which produce gasoline in any quantity has ever assumed to impose an excise tax of more than one cent per gallon, while the legislature of New Mexico, which produces no gaso-

line, has fixed the tax at two cents per gallon. We are advised that the Oregon legislature, recently in session, no gasoline being produced in that state, has followed in the footsteps of New Mexico and has attempted to impose a two cents per gallon excise tax. May we state briefly what we conceive to be the powers of the states, as determined by this court, over property imported from other states?

With *Gibbons v. Ogden* and *Brown v. Maryland* as the foundation stones, subsequent cases have been considered and the following doctrines announced:

(1) *Without violating the Commerce Clause of the Constitution the state may impose upon property partly produced within the state and partly imported from other states a uniform privilege or excise tax.*

Hinson v. Lott, 8 Wall. 148, is illustrative of this doctrine, although many other cases might be cited.

(2) *Without violating the Commerce Clause of the Constitution the state may impose a general and uniform property tax upon all property having a situs in the state, including that imported from other states.*

Brown v. Houston, 114 U. S. 622, and *Bacon v. Illinois,* 227 U. S. 504, are selected from many cases which have recognized this doctrine.

(3) *Without violating the Commerce Clause the state may enact and enforce reasonable police*

measures as respects property imported from other states where there is no discrimination against property so imported.

Among laws of the latter class are:

(a) *Inspection laws.*
(b) *Quarantine laws.*
(c) *Health laws.*
(d) *Laws licensing auction sales.*
(e) *Laws licensing peddlers and itinerant venders.*
(f) *Local regulations affecting commerce, if at all, only in an incidental manner.*

Illustrative of laws of the kinds last suggested the following cases may be cited:

Woodruff v. Parham, 8 Wall. 123;
Escanaba & L. M. Transportation Co. v. Chicago, 107 U. S. 678;
Parkersburg & O. R. Transportation Co. v. Parkersburg, 107 U. S. 691;
Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455;
Mugler v. Kansas, 123 U. S. 623;
Smith v. Alabama, 124 U. S. 465;
Leloup v. Port of Mobile, 127 U. S. 640;
Nashville, etc. R. Co. v. Alabama, 128 U. S. 96;
Kimmish v. Ball, 129 U. S. 217;
Voight v. Wright, 141 U. S. 62;

Potapsco Guano Co. v. Board of Agriculture, 171 U. S. 345;

New Mexico ex rel. v. Denver & R. G. Co., 203 U. S. 38;

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380;

Foote v. Stanley, 232 U. S. 494;

Armour & Co. v. Commonwealth of Virginia, 246 U. S. 1;

Pure Oil Co. v. Minnesota, 248 U. S. 158;

Standard Oil Co. v. Graves, 249 U. S. 389.

To these may be added *Wagner v. City of Covington*, 251 U. S. 95.

These and other pertinent cases decided by this court may be reviewed from the first one to the last one and not one of them, so far as we have been able to discover, will be found to have sustained laws not properly belonging to one of the classes just enumerated. Least of all is *Wagner v. Covington, supra,* in conflict with the principle for which we contend. In every single announcement in the opinion of Mr. Justice Pitney in that case we unqualifiedly concur. The Covington ordinance involved in that case had been construed by the court of appeals of Kentucky as being applicable alone to domestic business. The ordinance imposed a tax upon sales of soft drinks. Whatever the outside world may think, the author of this brief is able to assert that soft drinks *also* are occasionally produced in the state of Kentucky.

Certainly in the opinion in the Wagner Case there is no intimation that the Covington ordinance *could not* operate upon products produced in that Commonwealth. The opinion states:

> "The ordinances were and are respectively applicable to all wholesale dealers in such soft drinks in Covington, whether the goods were or are manufactured within or without the state."

If the article whose sale was taxed had been an article not produced in the state of Kentucky the question which we have attempted to present in the case at the bar might have been involved. But even so, and although we are right in our contention, the Covington ordinance had to be sustained because in its essence and purpose it imposed what is in the nature of a license tax upon the business of itinerant venders or peddlers.

Note the language of Mr. Justice Pitney:

> "From the facts recited it is evident that in essence that part of plaintiff's business which is subjected to regulation is the business of itinerant vender or peddler—a traveling from place to place within the state selling goods that are carried about with the seller for the purpose."

Now, if, in addition to burdens of the character above described admittedly legitimately imposed by a state upon property imported from other states, a state may impose an excise tax *ad libitum* upon the sales of property not produced within the state and which only reach the state by interstate commerce, then that power must exist upon the theory that the Commerce Clause

of the Constitution is wholly without application. In other words, if our contention is wrong, the court must hold that, *when a person imports into a state goods of a kind not produced in that state and breaks the packages in which shipped, the imported property is thereafter subject to the exertion of every state power which the state could exert with respect to property produced in the state, or with respect to a particular kind of property partly produced within the state and partly imported from other states, precisely as if the Commerce Clause of the Federal Constitution did not exist.*

If the italicised language is a correct statement of state power with respect to an excise tax expressly and exclusively imposed upon imported property, or when, without being specifically declared to be so limited, it is necessarily rendered so in its effect by virtue of the fact that the state produces no property of the kind imported, as it is a correct statement of state power with respect to general taxes and excise taxes operating alike upon property partly produced within the state and partly imported from other states, then it completely disposes of our argument.

The law which we have under consideration is not an inspection law, a quarantine law, a health law, a law licensing auction sales, or a law licensing peddlers or itinerant venders. It is not a police measure. If the law is to be sustained at all it must be sustained under the taxing power of the state. Would a general property tax be valid if by express terms or in the nature of things it were applicable only to products im-

ported from other states? We cannot believe so. Every decision of this court, from *Brown v. Houston,* to *Bacon v. Illinois* and *Susquehanna Coal Co. v. Amboy,* which has sustained a general property tax against the contention that it constituted a burden upon interstate commerce, has been based upon the fact that the law operated equally and uniformly upon all property within the state and without discrimination against that imported from other states. As respects a general property tax law, one finds it impossible to conceive of a case where, in the nature of things, the enforcement of the law would operate exclusively upon property imported from other states. The assumption of the existence of a state necessarily involves the notion of property within her borders. One cannot conceive of a state of the United States within which there is no property, real or personal. The rule, then, long ago established by this court and now universally recognized with respect to a general property tax, requires the existence of native property as a condition to the right generally to tax imported property. Is the doctrine different with respect to a privilege or an excise tax? Upon principle it cannot be. Otherwise the rule which renders general property tax laws invalid when discriminatory against property acquired in interstate commerce could be entirely evaded by making a classification or many classifications of property, the different classes to be made up exclusively of property not produced in the state but which finds a situs in the state after importation from other states, and imposing an excise tax upon the sale of such imported property in each and all of the various classes into which it may properly be divided.

Nor is the doctrine different upon authority. The original and leading case on this subject is that of *Hinson v. Lott, supra.* This involved the validity of a statute declaring it to be unlawful for any dealer in spirituous liquors to offer such liquors for sale within the limits of the state of Alabama without the payment of a tax of fifty cents per gallon. Another section of the law imposed precisely the same tax upon all whiskey and brandy manufactured in the state, so that the latter section was held to be complementary to the provisions first named and to make the tax applicable to and equal upon all liquor sold in the state without discrimination against that imported from other states. Accordingly, looking to the ultimate effect of the law, the court said:

> "It institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state."

For the reason stated the law was held to be an appropriate and legitimate exercise of the taxing power of the state. We do not for a moment believe that the Alabama law would have been sustained if it had been an effort to tax property imported from other states of a kind not produced or manufactured in the state of Alabama.

We submit, therefore, both upon principle and authority, that the excise tax, if valid, like a general property tax, must in the nature of things operate upon property produced in the state as and when it operates

upon property imported from other states. Moreover, when a case arises, as it has arisen in New Mexico, where the excise or privilege tax law, although general in its terms, nevertheless as a practical proposition, and because the state produces no property of the kind to which the law is directed, operates exclusively upon property imported from other states, then to say that the Commerce Clause is without application is to declare that clause inapplicable, we respectfully submit, to the very situation it was intended to control. To hold in these circumstances that the Commerce Clause ceases to be effective would be to destroy the fundamental difference between an organic law containing the Commerce Clause of our Constitution and the Articles of Confederation replaced by that great Instrument. So to hold puts it within the power, notwithstanding the Commerce Clause, of every state in the Union to exact its entire revenue by the imposition of privilege or excise taxes upon the sale of property produced exclusively in other states, or to prohibit the importation, by the exaction of taxes of the kind under consideration in such amounts as to render unprofitable the importation and sale of products to which the tax is directed. If New Mexico, while producing no gasoline, may impose an excise tax upon the sale of gasoline and the sale of nothing else, then another state which produces no wheat may support her local government by the imposition of a tax upon the sales of wheat within her borders after being imported from some other state. Another state which produces no cotton may resort to an excise tax upon the sales of cotton as the source of

her revenue. Another state which produces no sugar may support her local government by the imposition of an excise tax upon sales of sugar when brought from other states. Illustrations might be multiplied. If this is permissible, we submit that the fundamental purpose repeatedly announced by this Court as having actuated the framers of the Constitution of the United States in incorporating the commerce clause has utterly failed. Upon this theory each state may construct a Chinese Wall in the form of a privilege or excise tax which as a practical proposition will necessarily preclude the sale within her borders of any product whatever of other states not produced in the taxing state, because as said by Mr. Justice Miller in *Hinson v. Lott:*

> "It is obvious that the right to impose any such discriminating tax, if it exists at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without while the privilege would remain unobstructed in regard to articles made in the state. If this can be done in reference to liquors, it can be done with reference to all products of a sister state, and in this mode one state can establish a complete system of non-intercourse in her commercial relations with all of the other states of the Union."

In this great country it happens to be true respecting the great variety of products, that some products will be produced in one or in many of the states and not produced at all in others. Respecting such products, as well as with respect to products common to all states, the framers of the Commerce Clause had a

purpose to preclude the possibility of any state establishing a program of non-intercourse in her relations with any other state. Gasoline has become a requisite to our commercial and industrial life. Many states produce no gasoline. The non-producing states, if our contention is repudiated, will be in position either to support their local governments entirely by the imposition of excise and privilege taxes upon the sale of gasoline imported from other states, or to place the tax so high as to prohibit its importation.

The history connected with the consideration and adoption of the Commerce Clause is too well known to the members of this Court to justify elaboration or the citation of authorities. The controlling facts have been repeatedly announced in the great decisions of this Court, and, as we happen to know, the Court was recently treated to a learned dissertation upon the subject by one of the learned counsel, Alfred P. Thom, Esq., in the case upon the docket, according to their numbers, immediately preceding that now at the bar—*Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co.* Accordingly we forbear further to discuss the question. We do, however, respectfully and earnestly submit that this case presents an important question of constitutional law arising under the Commerce Clause never before directly presented to this tribunal, and a question never yet decided, unless it be held that the court intended to classify cases of this sort with the multitude of cases arising under police laws and supporting the theory that peddlers and itinerant venders selling from broken packages goods imported from other states may be sub-

jected to a license tax. We do not believe the court intentionally placed a case of this sort in that class. We respectfully and earnestly urge a decision, with the reasons stated for that decision, of the question:

> *May one of the United States single out an article of commerce not produced in that state and impose an excise tax in any amount whatever exclusively upon the right to sell from broken packages that article of commerce when brought into the state from some other state or foreign country?*

This discussion has been limited to the Commerce Clause of the Constitution for the reason that, although we relied upon the Equal Protection and Due Process Clauses, it seemed to us that argument thereon was foreclosed by such cases as *Southwestern Oil Co. v. Texas*, 217 U. S. 114, and that if it now be held that the Commerce Clause is without application, states not producing any article or articles of commerce which are the products of other states are absolutely without limit or restraint as to the amount of excise or privilege taxes that may be imposed as a condition to the right to sell such products when imported into the non-producing state.

VI.

THE STATUTE TO THE EXTENT THAT IT IMPOSES A TAX UPON THE RIGHT TO USE GASOLINE CONSTITUTES A TAX UPON THE PROPERTY ITSELF, AND IN THIS RESPECT THE STATUTE IS VOID BECAUSE IN CONFLICT WITH THE CONSTITUTION OF NEW MEXICO.

We merely mention this phase of the subject, because of its cumulative force in support of the contention that the act must be adjudged to be void in its entirety.

The plaintiff ships gasoline from other states into New Mexico for its own use, and actually uses the gasoline so shipped in the conduct of its business. A tax on the right to *sell* gasoline is termed an excise or privilege tax, but we submit that a tax on the right to *use* gasoline is a tax on the property itself. When a person is taxed on the right to use his horse such a tax of necessity is a tax on the horse. For this reason the statute in question, to the extent that it attempts to tax the owner of gasoline who acquires it otherwise than from a licensed distributor or retail dealer, if he assumes to use his property, is a tax on that property itself, and such a tax is in direct violation of section 1 of Article VIII of the Constitution of New Mexico, which reads:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon the subjects of taxation of the same class."

This, of course, means that a tax upon property must be based upon the value of the property, and if the tax on the right to use gasoline is, as we submit it must be held to be, a tax upon the gasoline itself, then it is a property tax not based upon the value of the property and, as stated, the statute in this respect is in direct conflict with the section of the state constitution just quoted.

It is respectfully submitted that upon the whole case the decree appealed from should be affirmed.

Respectfully submitted,

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Denver, Colorado, March 26, 1921.

APPENDIX.

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE SALE OR USE OF GASOLINE AND FOR A LICENSE TAX TO BE PAID BY DISTRIBUTORS AND RETAIL DEALERS THEREIN; PROVIDING FOR COLLECTION AND APPLICATION OF SUCH TAXES; PROVIDING FOR THE INSPECTION OF GASOLINE AND MAKING IT UNLAWFUL TO SELL GASOLINE BELOW A CERTAIN GRADE WITHOUT NOTIFYING PURCHASER THEREOF; PROVIDING PENALTIES FOR VIOLATIONS OF THIS ACT AND FOR OTHER PURPOSES.

H. B. No. 298 (as amended); approved March 17, 1919.

Be it Enacted by the Legislature of the State of New Mexico:

Section 1. DEFINITIONS. As used in this Act: The word gasoline means (a) the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of "gasoline"; (b) any volatile product or substance of not less than 46 degrees Tagliaube's Baume test derived wholly or in part from petroleum, natural gas, oil shales or coal; (c) any other volatile product or substance of not less than 46 degrees Tagliaube's Baume test, sold or used for producing motive power for internal combustion engines, or for producing power for propelling motor vehicles.

The word *person* means and includes all persons, corporations, firms, co-partnerships and associations.

The term *distributor of gasoline* means every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this State.

The term *retail dealer in gasoline* means a person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less.

Sec. 2. LICENSE TAXES. Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

Every retail dealer in gasoline shall pay an annual license tax of five dollars for each place of business or agency.

Such license taxes shall be payable on or before the first day of June, 1919 (for the half year ending

December 31st, 1919), and thereafter on or before the first day of December for each succeeding calendar year.

It shall be the duty of every person intending to deal in gasoline to make application to the Secretary of State for such license certificates, stating whether he intends to engage in such business as a distributor or retail dealer and at the time of submitting such application to pay the license tax as herein provided. License certificates for persons commencing business after July 1st in any year may be issued for a half year upon payment of half the annual license tax herein provided.

It shall be unlawful for any person to distribute or sell gasoline after July 1st, 1919, without having paid the said license tax and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof.

Every application for license shall be accompanied by remittance to the Secretary of State of the amount of such license fee. The net proceeds of all license fees received by the Secretary of State in any month derived from the licenses herein provided shall be deposited with the State Treasurer on or before the tenth day of the following month, to be credited to the State Road Fund.

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as

hereinafter provided at the rate of two cents per gallon upon all gasoline so sold or used.

On or before the tenth day of each calendar month, commencing with the month of August, 1919, every distributor of gasoline shall render to the State Auditor a true statement in such form as shall be prescribed by the Auditor, of all gasoline received and sold, distributed or used by such gasoline distributor during the preceding month, accompanied by remittance of an amount of money equal to a total of two cents per gallon for all gasoline sold, distributed or used during the month, which amount shall be paid over to the State Treasurer. Such statement shall also show from whom the gasoline so received was purchased or shipped. A duplicate of such statement shall also be forwarded by such distributor at the same time to the district inspector for the district in which such gasoline distribution place of business or agency is located.

Sec. 4. On or before the tenth day of each calendar month every retail dealer in gasoline shall render to the State Auditor a true statement, in form prescribed by the Auditor, of all gasoline received, sold and used by such dealer during the preceding month, which statement shall show from whom such gasoline was purchased; a copy of such statement shall also be forwarded by such dealer to the district inspector for the district in which such dealer's place of business is located. If any of the gasoline sold or used by any such dealer was purchased from any other person than a licensed distributor in this State, said dealer shall at the time of making the return accompany the same by a remittance of an amount of money equal to a total of

two cents per gallon upon such gasoline sold or used to be paid over to the State Treasurer.

Any such distributor or dealer who shall fail to make such return or statement, or who shall make any false return or statement, or refuse, neglect or fail to pay the tax upon all sales or use of gasoline as herein provided, or who shall knowingly sell, distribute or use any gasoline without the tax upon the sale or use thereof having been paid or provided for as herein required shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each offense and in addition to such punishment shall forfeit the license and right to carry on such business and shall not again be permitted to engage in such business in this State until after one year from the date of such conviction.

Any distributor or dealer who shall fail or refuse to make such return, or fail to pay the taxes herein provided for, or who shall make any false return hereunder, shall be enjoined in an action brought in the name of the State from further distributing or selling gasoline in this State until he shall have complied with the provisions of this Act or until after one year from the date of conviction for any violation thereof.

If any tax imposed under the provisions of this Act shall not be paid when due there shall be added thereto a penalty of five per cent of the amount thereof and the said tax and penalty shall bear interest at the rate of one per cent per month until paid. It shall be the duty of the State Treasurer to cause suit to be brought in the name of the State to collect such delin-

quent tax and penalty and interest and it shall be the duty of the Attorney General or any district attorney to commence and prosecute such suit at the request of said Treasurer.

Sec. 5. It shall be unlawful for any person (except tourists or travelers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.

Every person who shall use any gasoline not purchased from a licensed distributor of gasoline, or licensed retail dealer in gasoline in this State, shall, on or before the tenth day of each calendar month render to the State Auditor a true statement of all gasoline so purchased and used during the preceding month and shall at the time of making such return accompany the same with remittance of an amount of money equal to a total of two cents per gallon upon all gasoline so used, which amount shall be paid over to the State Treasurer.

It shall be unlawful for any person to knowingly use any gasoline without the said excise tax upon the sale or use thereof having been paid or provided for according to this Act; Provided, that any tourist or traveler coming into the state in a motor vehicle may bring into the State in such vehicle and for his own use only not more than twenty gallons of gasoline at one time and use the same without payment of tax thereon.

Sec. 6. INSPECTORS: DUTIES. The Governor shall appoint one inspector for each of the eight judi-

cial districts of the State, and such inspectors shall hold their offices during the pleasure of the Governor.

Such inspectors shall see to the enforcement of the provisions of this Act, and shall be authorized to examine the books and accounts of all distributors of gasoline or retail dealers in gasoline or warehousemen or others receiving or storing gasoline and of railroad or transportation companies, relating to purchases, receipts, shipments or sales of gasoline.

Each inspector shall receive a salary of one hundred and fifty dollars per month, which shall include necessary traveling expenses actually incurred while performing the duties of his office.

Such salary and expense bills shall be paid and vouchered in the same manner as the salaries and expenses of other state employes, and shall be paid out of the State Road Fund.

Every such inspector shall take and subscribe the oath of office prescribed by the Constitution, and shall furnish and file with the Secretary of State a surety company bond in the sum of two thousand dollars in form to be approved by the Attorney General.

Sec. 7. It shall be unlawful for any public garage owner, operator or any distributor of gasoline or retail dealer in gasoline, or any other person, to sell gasoline of a lower grade than 46 per cent or degrees Tagliaube's Baume Test, or gasoline adulterated with water, kerosene or other substance, without first notifying the purchaser by a statement stamped or stenciled on the package or delivered to the purchaser, stating the true grade of such gasoline or the fact of such adulteration.

Sec. 8. Any person who shall engage or continue in the business of selling gasoline without a license or after such license has been forfeited as provided in this Act, or who shall fail to render any statement required by this Act, or make any false statement therein, or who shall violate any other provision of this Act, the punishment for which has not been hereinbefore provided, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

Sec. 9. The State Treasurer shall set aside from the license fees and the taxes collected under the provisions of this Act a sufficient sum each year to pay the salaries and traveling expenses of the inspectors as herein provided, which salaries and expenses shall be paid in the manner provided by law for payment of salaries and expenses of other State officers and employes; the balance of the moneys so received from such collections shall be placed to the credit of the State Road Fund to be used for construction, improvement and maintenance of public highways.

Sec. 10. That it is necessary for the preservation of the public peace and safety of the inhabitants of the State of New Mexico that the provisions of this Act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist and this Act shall take effect and be in full force and effect frm and after its passage and approval.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 695.

O. O. ASKREN, ETC., ET AL.,
Appellants,
vs.
THE CONTINENTAL OIL COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

APPELLEE'S SUPPLEMENTAL BRIEF.

STEPHEN B. DAVIS, JR.,
E. R. WRIGHT,
Solicitors for Appellee.

MILTON SMITH, W. H. FERGUSON,
CHARLES B. BROCK, ELMER L. BROCK,
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I.

AUTHORITIES CITED BY APPELLANTS.

To the First Proposition.

Appellants contend that the entire Act is not rendered unconstitutional merely because it cannot be constitutionally applied in all cases, citing 1 *Sutherland Statutory Construction*, Sec. 298; *McCullough v. Commonwealth*, 172 U. S., 102; *Kehrer v. Stewart*, 117 Ga. 969; *Ratterman v. W. U. T. Co.*, 127 U. S. 411.

None of these citations conflict with the propositions which we have advanced in our briefs. The quotation from *Sutherland* simply announces a well recognized principle of law which is clearly applicable for the construction of statutes, where there is opportunity for construction. This quotation also clearly announces the rule for which we contend at another place in this brief. The case of *Ratterman v. W. U. T. Co., supra*, did not involve any question as to whether the Act to be construed was severable or not. A single question was there certified to the Supreme Court and the Supreme- Court answered the question. No suggestion was made as to whether the law was or was not severable. The case of *Kehrer v. Stewart, supra*, involved a construction placed upon the Act by the Supreme Court of the State of Georgia. In disposing of this case upon appeal to this Court (197 U. S. 60), this Court followed the construction placed upon the Act by the Supreme Court of Georgia. There is nothing in the case of *McCollough v. Commonwealth, supra*, which announces any new or startling doctrine. There is no similarity between the statutes involved in that

case and in the case at bar; there was opportunity for construction, and the Act was construed.

To the Second Proposition.

Appellants contend that the domestic business of the corporate appellee was properly subject to taxation, citing *Crutcher v. Kentucky*, 141 U. S. 47, and *Kehrer vs. Stewart*, 197 U. S. 60. We do not question the soundness of this proposition.

To the Third Proposition.

Appellants contend that the term "severability", as used by this Court, includes the idea of "seperability" in enforcement of the Act, citing *Chesapeake & O. R. R. Co. v. Kentucky*, 179 U. S. 388. This case, in our humble opinion, is not authority for the proposition to which it is cited. The case came up on a writ of error to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky had construed the Act as applying only to intrastate transportation. The holding of this Court is merely to the effect (under the well recognized rule) that the construction of a State Statute by the highest court of that State is to be read into and is a part of the law and binding upon this Court. We therefore cannot see how this case can be authority for the contention made by consel for the appellants.

To the Fourth Proposition.

Appellants contend that the severability or inseverability of a statute will be determined by its practical operation, citing *Wagner v. Covington*, 251 U. S. 95, *Corn Products Co. v. Eddy*, 249 U. S. 427,

Reid v. Colorado, 187 U. S. 137, *Packet Co. v. Keokuk*, 95 U. S. 80.

The case of *Wagner v. Covington, supra*, has been fully considered in the main brief. The case of *Reid vs. Colorado, supra*, involved a police regulation prohibiting the bringing into Colorado of diseased cattle, or, rather, cattle from certain tick infested districts. This case is clearly not in point to the proposition to which it is cited. The question involved in *Corn Products Co. v. Eddy, supra*, primarily related to an alleged conflict between State and Federal pure food regulatory statutes.

In the case of *Packet Co. v. Keokuk, supra*, the Court lays down the proposition for which we contend, namely, that statutes which are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, *provided the allowed and prohibited parts are severable.*

To the Fifth Proposition.

Appellants contend that appellee was not entitled to the injunction in this case for the reason that in their pleadings they disawoved any intention to enforce the Act in an unconstitutional manner, regardless of the plain language of the statute and the plain intent of the Act as expressed within the four corners of the Act, citing the case of *Weigle v. Curtice Bros. Co.*, 248 U. S. 285. The appellants quote therefrom, from the statement of the case. This case involved a statute of the State of Wisconsin making it unlawful to sell any article of food containing benzoic acid or benzoates. The defendants in the trial courts denied that there was any intent to enforce the law against original packages shipped into the State in interstate commerce. This was

treated by the trial court as eliminating from the case the matter stated, and the case upon appeal turned upon other questions not material here.

The question of the severability of the Act does not seem to have been presented, or involved in the case.

To the Sixth and Seventh Propositions.

The appellants contend that injunction will not be granted in the absence of an attempt by the taxing officers to so enforce a law as to contravene rights of the plaintiff. To this proposition, appellants cite *Austin v. Board of Aldermen*, 7 Wall, 694; *Ohio River Co. v. Dittey*, 232 U. S. 576; *Tiernan v. Rinker*, 102 U. S. 123; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307.

The question here to be considered is so closely connected with the last proposition advanced by the appellants that we can consider the two propositions together.

The last proposition advanced by the appellants is that where a law is in general terms and includes a tax on both domestic and interstate commerce, the Federal Court will, in the absence of an adjudication by the State Court, presume that the law will be construed as applying to that only which the State may constitutionally tax, citing: *St. Louis, etc., R. Co. v. Arkansas*, 235 U. S. 350; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304; *Ratterman v. W. U. T. Co.*, 127 U. S. 411; *Western Union v. Pennsylvania*, 128 U. S. 39; *McCullough v. Virginia*, 172 U. S. 102; *Supervisors v. Stanley*, 105 U. S. 305.

All of the cases cited state the doctrine that the Federal Courts ought not to place a construction upon an Act which would render it unconstitutional.

With this doctrine, we have no quarrel, provided there is room for construction. An examination of *Singer Sewing Machine Co. v. Brickell, supra, Ohio River Co. v. Dittey, supra, and McCollough v. Virginia, supra,* shows that they all deal with the subject of the construction of Acts ambiguous or uncertain as to their meaning and, so far as we understand the cases, do not involve the question of the severability of an Act. In the case of *Tiernan v. Rinker,* cited *supra,* the Act was clearly separable, and was so construed by this Court. In the case of *St. Louis, etc., R. Co. v. Arkansas, supra,* this Court construed a statute requiring corporations organized under the laws of Arkansas, as well as foreign corporations wishing to do business in that State, to pay certain taxes. The statute clearly was not intended to burden interstate commerce, but merely imposed a tax for the privilege of exercising corporate powers in Arkansas, and the Court held that the forfeiture provisions therein contained could be no broader than the charter rights granted to the corporation by the State of Arkansas, and that when the statute provided for a forfeiture of the charter, the Act meant only the charter granted by that State, and could not affect any rights a foreign corporation under the commerce clause.

We fail to se where the case of *Austin v. Board of Aldermen, supra,* has any application to the questions presented upon this appeal. The case of *Ratterman v. W. U. T. Co., supra,* as heretofore stated, turned upon the answer to a question certified to this Court and the decision of this Court was limited to an answer to the question propounded. The case of *Supervisors v. Stanley, supra,* involved the construction of an Act admittedly partly valid and

partly invalid, and, as we read the opinion, it turned upon the separability o fthe Act.

This Court, having, in the opinion upon the former appeal, declared that the New Mexico Gasoline Tax Act of 1919 was in part valid and in part invalid, we take it that the only question remaining upon this branch of the case is to determine whether the Act is or is not separable; that all other questions are in fact precluded. Otherwise this Court would have finally determined all the issues upon the first appeal.

If the Act is not separable, then the judgment and decree of the District Court should be upheld. If it is separable, then the tax upon the domestic business of the appellee should be sustained, unless the Court should otherwise hold the Act void in its entirety, because of the clear discrimination against interstate commerce.

II.

THE NEW MEXICO GASOLINE ACT DISCLOSES A CLEAR INTENT TO BURDEN INTERSTATE COMMERCE.

Under their third and fourth points, counsel for the appellants contend, first, that the term "severability", as used by this Court in the opinion on the former appeal, includes the idea of "severabilit" in the enforcement of the Act and that such "severability" or "inseverability" will be determined by the practical operation of the statute.

Under point seven, they also contend that where a law in general terms includes a tax upon both domestic and interstate commerce, the Federal Court will, in the absence of an adjudication by the State

Court, presume that the law will be construed as applying to that only which the State may constitutionally tax.

In the main brief filed in this case on behalf of the appellee, it has been clearly pointed out that there is no room for construction of a statute where the statute, is plain in terms and a constitutional effect can be given thereto only by amendment or interlineation. It is not the purpose of counsel in this brief to repeat anything that has been covered in the original brief, but we do desire to call the Court's attention to a line of decisions in this Court construing gross earnings taxes levied by the States.

Innumerable cases have been before this Court involving the constitutionality of gross earnings taxes. It is difficult to reconcile all of these cases. This Court has not hesitated to declare such taxes invalid when the same result in a direct burden upon interstate commerce or when such laws amount to a tax upon property outside the jurisdiction of the taxing power, but this Court has declined to set aside such taxes simply because interstate and intrastate earnings, together, have been used as a standard or measure of value (for the purpose of determining the physical valuation of a going business or public utility which included certain franchises or intangible values); but this Court, in applying this rule, has repeatedly stated that if the tax may be said to be so directly aimed at interstate earnings as to *evidence an intention* to levy upon them as such, it should be declared invalid as an unlawful burden upon interstate commerce.

United States Express Co. v. Minnesota, 223 U. S. 335.

Singer Sewing Machine Co. v. Brickell, 233 U. S. 304.

Galveston, Harrisburg & San Antonio Railroad Co. v. Texas, 210 U. S. 217; dissenting opinion Mr. Justice Harlan.

In the case of *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, this Court discussed the validity of a license tax on foreign corporations, from the point of view of intention or lack of intention of the Legislature to impose a tax on interstate business. After discussing this proposition and the evidence offered, which consisted of a history of previous legislation, the Court held that the statute must stand or fall by its own terms.

In the still later case of *Standard Sanitary Manufacturing Co. v. U. S.*, 226 U. S. 49, this Court, construing the Sherman Act, said:

> "The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results."

The provisions of the New Mexico Gasoline Tax Act and the plain intent and meaning thereof have been fully discussed in the main brief. Pending this appeal, the New Mexico Legislature, March 12, 1921, passed an Act repealing the Act of 1919 involved in this case, by an Act entitled: "An Act to Retroactively and Prospectively Levy an Excise Tax on Gasoline: Provide for the Distribution of the Proceeds Thereof and to Repeal Certain Laws", and put in force an entirely new system of taxation upon gasoline. For the information of the Court, the Act of March 12, 1921, is printed in full as an appendix

to this brief. By this Act, the Legislature repeals the Act of 1919 and then attempts to retroactively impose a two cent tax upon every sale of a gallon of gasoline made within the State of New Mexico, except sales made in interstate commerce. This tax is made retroactive to March, 1919, a period of time three months prior to the time of the tax imposed by the Act herein questioned (Chapter 93, Laws 1919). The effect of the Act of 1921 is to impose a two cent tax upon every sale made by a distributor of gasoline, with an additional two cent tax upon every gallon of gasoline re-sold by retail dealers. The result is that, under the Act of 1919, we have a two cent tax upon every gallon of gasoline, and by the Act of 1921, we have, in case of a primary sale by the distributer and a re-sale by the retailer, an additional tax of four cents for each gallon, making the minimum possible tax to be collected under both laws amount to six cents per gallon. If there are numerous re-sales, by successive retailers, before the gasoline reaches the ultimate consumer, the tax may well exceed the value of the gasoline.

We take it that this Court will take judicial notice of the Act of 1921, as bearing upon the intent of the Legislature. Taking this legislative history together with the admission contained in the pleadings, namely, that gasoline is the only commodity taxed under the Laws of the State of New Mexico in the manner here attempted to be taxed, and the further admission in the pleadings that no gasoline is produced within the State of New Mexico, but that all gasoline sold within the State of New Mexico is imported from other states, the conclusion is irresistible that there is a clear discrimination against gasoline, which is a prduct of other states.

It therefore follows that there is now much

more in this case than *"the mere fact that the gasoline is produced in another state"*, as stated in the opinion upon the former appeal. We have the following additional facts:—(a) That no gasoline is produced within the State of New Mexico; (b) That all gasoline sold in New Mexico is brought into the State in interstate commerce; (c) No other commodity is subjected to a similar tax by the Laws of the State of New Mexico, either by way of license tax or excise tax; (d) The Act of March 12, 1921, evidencing a deliberate discrimination against a product only produced in another state.

In the main brief filed in this case, counsel for the appellee state that this is in fact a new and novel question; that. so far as they are advised, it has never been before the Court. It is true, so far as we have been able to discover, that the question has never been directly passed upon by the Court, although Mr. Justice Nelson, in our opinion, clearly pointed out the possibilities resulting from a situation similar to the one presented in the case at bar, in his dissenting opinion in the case of *Hinson v. Lott*, 8 Wall. 148. Without quoting from this case or repeating what has been said in the main brief, we think the conclusion is inevitable, that if the states have the right to discriminate against the products of another state by imposing a tax as in the case at bar, then there is no limit to the power of the state legislature in such respect.

We do not see how it is possible to make out a clearer case of discrimination than is made out in the present case. By a combination of two laws, an almost prohibitive tax, of six cents, is attempted to be levied upon each gallon of gasoline sold in the State of New Mexico, except gasoline sold in interstate commerce.

III.

SECTION I, ARTICLE VIII, OF THE NEW MEXICO CONSTITUTION.

> "Section I. Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."
> —Section I, Article VIII, New Mexico Const.

In the face of this constitutional provision an arbitrary tax of two cents per gallon could not be sustained as a property tax, or as a tax upon tangible property. The New Mexico Act imposes a tax of two cents per gallon upon each gallon of gasoline sold or used within the State of New Mexico.

As stated in the main brief, the attempt to tax the use and enjoyment of gasoline, or of any other commodity, as distinct from general property taxes upon such commodities, is a startling innovation in the scheme of State Taxation.

Ownership of property includes three elements: (a) possession; (b) enjoyment and use; (c) right to dispose of same. The New Mexico statute attempts to impose a tax burden upon the right to sell or dispose of gasoline *as a business,* and also attempts to tax *the use and enjoyment* of all gasoline brought into the state not passing through the hands of a licensed dealer in gasoline, and this is done under the guise of a statute designated as an inspection law, but containing no provision for inspection, and which is in fact a revenue law. To avoid the prohibition contained in the Constitution, the Legislature designates the two cent tax as an "excise tax".

The gasoline is subject to the general property tax as is all other property within the State. To single out gasoline, a commodity only coming into New Mexico in interstate commerce, and impose an additional burden upon this commodity clearly violates the New Mexico Constitution.

It has been repeatedly held that a flat tax of so much per gallon upon gasoline, kerosene and other petroleum products, which is greatly in excess of the cost of inspection, cannot be sustained as an inspection tax under the police powes of the state, and that such tax is in fact imposed for revenue purposes. Constitutional provisions prohibit the colection of an arbitrary fee or tax as a property tax, or as a tax upon tangible property, as stated in the New Mexico Constitution.

As a matter of fact and law the two cent tax is an attempted property tax and as such void under the New Mexico Constitution.

State vs. Cumiskey 97 Kan. 343; 155 Pac. 47.
Bartles Northern Oil Co. vs. Jackman, 150 N. W. 576.

The case of*State vs. Cumiskey,* involved a so-called inspection tax upon petroleum products of ten cents per barrel. It appeared that the tax greatly exceeded the cost of inspection and the court held the act void as an inspection tax and further:—

"The conclusion of law is that the portion of Section 8 fixing the fee at 10 cents per barrel, as an inspection fee, is void; that Section 1 of Article II of the Constitution, requiring a uniform and equal rate of assessment and taxation, forbids collection of the fee as a property tax;

and that no other provision of law authorizes collection of the fee."

The case of *Bartles Northern Oil Co. vs. Jackman,* (N. D.) involved an inspection tax upon oils also greatly in excess of the cost of inspection. The act was held void as an inspection tax, the Court saying further:—

> "It is also contended by respondent that the provisions fixing the amount of the fee are in conflict with various sections of the State Constitution, and particularly with Section 176, which provides that laws shall be passed taxing by uniform rule all property, according to its true value in money. We need not dwell upon this point, because if the evidence adduced at trial sustains the allegations of the complaint as to the relative amount of fees and expenses, it is a revenue measure and comes within the terms of the decision recently made by this Court in *Malin vs. LaMoure County*, 50 L. R. A. (N. S.) 997, where this subject was fully considered."

The case last referred to (*Malin vs. LaMoure County*) involved a graduated tax upon estates for the privilege of having same administered in the probate court, requiring an initial deposit of $5.00, with an additional fee for each estate exceeding varying amounts. This law was held to be a property tax upon the body of the estate, and not a privilege tax upon the right of inheritance, the Court saying:

> "As an attempt to levy a property tax, the act in this particular is invalid for several reasons: 1. It violates Section 1 of Article 13, of

the Constitution, in imposing an extraordinary tax upon the property to which is applies, in addition to the equal and uniform tax to which alone all property in the state is liable."

A similar conclusion appears to have been reached by the Supreme Court of the United States in the case of *Standard Oil Company vs. Graves,* referred to with approval by the Supreme Court in the opinion in the case at bar.

In the light of the foregoing decisions there is no option left, if the tax is to be sustained, except to say that a tax upon the use and enjoyment of an article, is a privilege tax. To so hold certainly violates every reasonable conception of the nature of a privilege tax. To hold such a tax to be a privilege tax makes the provisions of Section 1 of Article VIII of the Constitution absolutely meaningless so far as personal property is concerned. And if the legislature can arbitrarily tax the use and enjoyment of personal property without regard to the actual value thereof, why cannot the legislature also impose the same arbitrary tax upon the use and enjoyment of real property

A still further argument against this character of a tax arises under the second provision of Section 1 of Article VIII of the Constitution. Can the legislature single out one item of personal property and say that the use and enjoyment of that particular item, in addition to the general property tax upon all tangible property, shall have imposed thereon as a condition precedent to such use and enjoyment, a tax of two cents per gallon? If such are valid the legislature can single out each and every article used by the people of this state and fix an

arbitrary tax thereon as a condition precedent to its use and enjoyment by the people.

We, therefore, contend that the tax upon the use of gasoline must be considered as a property tax and as such void under the provisions of Section 1 of Article VIII of the State Constitution.

If it be admitted, for the sake of the argument, that the tax upon the use of gasoline is a property tax, and as such void under the provisions of the New Mexico Constitution, it is undoubtedly true that this portion of the Act can be severed from the balance of the Act under the well recognized rules announced by this Court. Such being the case, gasoline shipped in interstate commerce to the ultimate consumer, is tax exempt, as the sales in interstate commerce cannot be taxed. The result would be that all local dealers in gasoline would be penalized to the extent of the tax for the privilege of doing an intrastate business rather than an interstate business, and again we are confronted with the question as to whether or not, by striking out the unconstitutional provisions, the remaining portion of the law would carry out the original legislative intent. We think not.

Santa Fe, New Mexico, December 20, 1919.

Respectfully submitted,

STEPHEN B. DAVIS, JR.,
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MILTON SMITH,
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APPENDIX "A".

SENATE STEERING COMMITTEE SUBSTITUTE FOR HOUSE COMMITTEE SUBSTITUTE FOR HOUSE BILL No. 1.

(As amended by the House.)

AN ACT

To Retroactively and Prospectively Levy an Excise Tax on Gasoline: Provide for the Distribution of the Proceeds Thereof and to Repeal Certain Laws.

Be it Enacted by the Legislature of the State of New Mexico:

Section 1. *Definitions.*—As used in the Act the word "gasoline" means (a) the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline; (b) any volatile substance or product of not less than 46 degrees Tagliaubes Baume test derived wholly or in part from petroleum, natural gas, oil shales or coal; (c) any other volatile substance or product of not less than 46 degrees Tagliaubes Baume test sold or used for producing motive power in internal combustion engines for producing power for propelling motor vehicles.

The word "person" means and includes any person, corporation, co-partnership, company, agency, or association.

The term "distributor of gasoline" means a person engaged in selling gasoline from tank cars, receiving tanks or stations or in or from tanks, bar-

rels or packages not purchased from a licensed distributor of gasoline in this State, except persons engaged in selling gasoline exclusively in interstate commerce.

The term "retail dealer in gasoline" means a person other than a distributor of gasoline, engaged in selling gasoline in quantities of fifty gallons or less, except persons engaged in selling gasoline exclusively in interstate commerce.

Sec. 2. *License Taxes.*—Every distributor of gasoline shall pay an annual license tax of twenty-five dollars for each distributing station or place of business or agency.

Every retailer in gasoline shall pay an annual license tax of five dollars for each place of business or agency.

Such license tax shall be payable on or before the first day of June, 1921, for the half year ending December 31, 1921, and thereafter on or before the first day of December for each succeeding calendar year.

It shall be the duty of every person intending to deal in gasoline, the sale of which is taxable under this act, to make application to the Secretary of State for such license certificates stating he intends to engage in such business as a distributor or as a retail dealer and at the time of making such application to pay the license tax herein provided. License certificates for persons commencing business after July 1st, in any year may be issued for a half year upon payment of half the annual license tax herein provided.

After this act takes effect it shall be unlawful for any person to distribute or sell gasoline, the sale of which is taxable under this act, without having paid the said license tax and without having at all

times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof. The net proceeds of all license fees received by the Secretary of State in any month from lincenses herein provided, shall be on or before the tenth day of the next succeeding month paid into the State Treasury to be covered into the State Road Fund.

Sec. 3. There is hereby levied and imposed an excise tax of two cents per gallon upon the sale of all gasoline sold in this state from March 17, 1919, to and including the date of the taking effect of this act and an excise tax of one cent per gallon upon the sale of gasoline sold in this state thereafter, excepting in both cases, however, such gasoline as is or has been brought into this state and sold in original packages as purely interstate commerce sales or purchased outside the state and brought into this state in original packages by the consumer for his own use.

Sec. 4. Within thirty days after this act shall take effect, every distributor of gasoline and every retail dealer in gasoline shall render to the State Auditor on forms prescribed by said auditor, a true and correct statement of all gasoline sold by such distributor between March 17, 1919, and the date of the taking effect of this act, other than gasoline, the sale of which is excepted from taxation hereunder. Every distributor and retail dealer shall accompany such statement with an amount of money equal to the tax herein laid upon such gasoline and the proceeds of such tax shall be paid into the State Treasury and covered into the State Road Fund, with the exception of fifteen thousand dollars thereof, which shall be covered into the State Fish Hatchery Fund,

which fund is hereby created and be expended for the erection of State Fish Hatcheries under the direction and control of the State Game Commission.

Sec. 5. On or before the tenth day of each month after the taking effect of this act every distributor of gasoline and every retail dealer in gasoline shall render to the State Auditor on forms prescribed by said Auditor, a true and correct statement of all gasoline sold by such distributor or dealer during the preceding month, except gasoline the sale of which is excepted from taxation hereunder, and shall accompany each such statement with an amount of money equal to the tax herein laid upon such gasoline provided, however, that the first statement and remittance required under this section shall be made on or before the tenth day of the month next succeeding that in which this act takes effect and shall be for gasoline, the sale of which is taxable hereunder, sold from the date when this act takes effect to the last day of said month.

The proceeds of such tax shall be paid into the State Treasury and covered into the State Road Fund, with the exception of fifteen thousand dollars thereof, which shall be covered into the State Fish Hatchery Fund out of the collections made during the eleventh fiscal year and the said fifteen thousand dollars shall be available during said fiscal year for the construction of State Fish Hatcheries under the direction and control of the State Game Commission, the moneys so covered into the State Fish Hatchery Fund shall be disbursed by warrant drawn by the State Auditor supported by certified and itemized vouchers of the State Game Commission.

Sec. 6. Any such distributor or retail dealer who shall fail to make returns and remittances re-

quired under this act and who shall knowingly sell or distribute any gasoline without the tax thereon having been paid or provided for as herein specified, upon conviction shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense.

Sec. 7. Any distributor or retail dealer violating the provisions of this act shall be enjoined by this State from further distributing or selling of gasoline, the sale of which is taxable in this State until it shall have complied with the provisions of this act.

Sec. 8. When any tax hereunder shall not be paid when due the same shall be considered delinquent and there shall be added to such tax a penalty of five per centum of the amount thereon and interest upon such tax a penalty of one per cent per month until paid.

Sec. 9. Chapter 93 of the Laws of 1919 and so much of any other law as is in conflict of any provisions of this act are hereby repealed.

Sec. 10. That it is necessary for the preservation of the public peace and safety of the inhabitants of the State of New Mexico that the provisions of this act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist and this act shall take effect and be in full force and effect from and after its passage and approval.

IN THE

Supreme Court of the United States

No. 695

O. O. ASKREN, ET AL., Appellants,

vs.

THE CONTINENTAL OIL COMPANY, Appellee.

MOTION TO ADVANCE CAUSE ON CALENDAR.

HARRY S. BOWMAN,
Attorney General of the State of New Mexico.

A. B. RENEHAN,
Special Assistant Attorney General of the State of New Mexico.

E. R. WRIGHT,
Attorney for Appellee

IN THE SUPREME COURT OF THE UNITED STATES

O. O. ASKREN, ET AL., Appellants,

vs. No. 695

THE CONTINENTAL OIL COMPANY, Appellee.

MOTION TO ADVANCE CAUSE ON CALENDAR.

Now come the appellants, and Harry S. Bowman, Attorney General of the State of New Mexico, and A. B. Renehan, Special Assistant Attorney General of the State of New Mexico, and move the Court to advance the said cause upon the calendar, so that it may be heard at the present term of the said Supreme Court, for the following reasons:

1. That the said cause has heretofore been before the said Supreme Court, and all substantial matters therein have been decided in favor of the State of New Mexico, except the determination of the relative importance of the taxable part of the business as compared with that part thereof which is non-taxable, wherefore the Court declined to say in the "preliminary stage of the cases****whether the act is separable and capable of being sustained so far as it imposed a tax upon business legitimately taxable," which was reserved for the final hearing.

2. That on the trial of the said cause on the merits before the United States District Court for the District of New Mexico, the facts tending to show the relative importance of the two classes of business were stipulated substantially as follows:

(a) That, during the year 1918, 3,862,150 gallons of gasoline, shipped into New Mexico, were sold in said State after breaking the packages in which said gasoline was introduced into New Mexico, and that said quantity is an aggregate of sales made in that year from broken packages, by The Continental Oil Company;

(b) That, during the said year 1918, 230,400 gallons of gasoline, shipped into New Mexico from other states, were sold in New Mexico in the original packages in which said commodity was introduced into said State, by The Continental Oil Company;

(c) That in the year 1919, the aggregate of sales made from broken packages of gasoline, shipped into the State of New Mexico from other states, amounted to 3,749,900 gallons, by The Continental Oil Company;

by the said Company in the said State, in the original containers in which introduced, amounted to 84,350 gallons;

(e) That in the first seven months of the year 1920, The Continental Oil Company sold in New Mexico, from broken packages, 2,522,350 gallons of gasoline;

(f) That in the first seven months of the year 1920, the said Company sold in New Mexico, in the original containers in which shipped, 264,550 gallons of gasoline;

(g) That from July 1, 1919, to August 1, 1920, The Continental Oil Company consumed for its own use, of gasoline which it had shipped from other States, 7,984 gallons, in the regular conduct of its business, and of this quantity 3,600 gallons were consumed from July, 1919, to December, 1919, inclusive, and 4,384 gallons were consumed and used from January, 1920, to July, 1920, inclusive;

3. That it is estimated that about $350,000.00 of taxes have been collected by all companies selling gasoline in the State, since the law in question went into force, which sum is held by the various companies and selling agencies to await the event of this action, and by the law, the said sum, if obtained by the State, shall be applied to road making.

4. That it is necessary for the business of the State of New Mexico, its welfare, and for the advancement of its road-building enterprises, that the validity or invalidity of the law in question should be determined at the earliest possible moment, to the end that if the said law is finally held valid and enforcible as against gasoline taxable under the decision of this Court, it may have the benefit of the said tax at the earliest possible moment, for that it is and has been the practice of all dealers in gasoline affected by the law, to require the consumers of gasoline to pay the said tax, and the money derived from such payment is held by such sellers of gasoline in their own hands to abide the event of this litigation, and if the said law is valid then the State should have such moneys, and if the law is invalid the consumers should be in position to recover the moneys exacted from them as aforesaid.

5. That the question of the separability of the said act was in substance argued before this Court in the hearing in causes Nos. 521, 522 and 523, consolidated, October Term, 1919, decided April 19, 1920.

HARRY S. BOWMAN,
Attorney General of the State of New Mexico.
A. B. RENEHAN,
Special Assistant Attorney General of the

STATE OF NEW MEXICO,
COUNTY OF SANTA FE, } ss:

Harry S. Bowman, Attorney General of the State of New Mexico, being first duly sworn, upon his oath, says: That he has read over and knows the contents of the foregoing motion, and that the same are true of his own knowledge.

HARRY S. BOWMAN,

Subscribed and sworn to before me this 2nd day of March, 1921.

(Seal) MINNIE BRUMBACK,
Notary Public.

My commission expires November 12, 1924.

The Continental Oil Company and
E. R. Wright, its attorney,
Santa Fe, New Mexico:

Take notice that the foregoing motion will be presented before the Supreme Court of the United States at Washington, D. C., on the next motion day, Monday, March 7, 1921, on the incoming of the Court, by which time the motion will be in printed form, and copies of it in such form served upon you.

Dated at Santa Fe, New Mexico, March 1, 1921.

HARRY S. BOWMAN,
Attorney General of the State of New Mexico.

A. B. RENEHAN,
Special Assistant Attorney General of the State of New Mexico.

Service of a copy of the said motion this 2nd day of March, 1921, by the appellee company, is hereby admitted.

E. R. WRIGHT,
Attorney for Appellee.